The Netherlands

by

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Attachment of Assets

Brief Introduction to Civil Procedure in the Netherlands[1]

The Netherlands civil procedural law is mainly regulated in a special code: the *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure, hereinafter: CCP), which is divided into four books.

Book I (*Van de wijze van procederen voor Rechtbanken, de Hoven en de Hoge Raad*) contains the regulations pertaining to litigation in the various civil courts.

Book II (*Van de gerechtelijke tenuitvoerlegging van vonnissen, beschikkingen en authentieke akten*) deals with enforcement measures by attachment and some other enforcement measures (especially incremental penalty payment (*dwangsom*) and committal for failure to comply with a judicial order (*lijfsdwang*)).

Book III (*Van rechtsplegingen van onderscheiden aard*) regulates—amongst others—the provisions regarding protective measures by attachment.

Finally, Book IV (*Arbitrage*) covers arbitration proceedings, both in—and outside the Netherlands.

The structure of the civil courts in the Netherlands is the following. As in most countries, there is one Supreme Court (*Hoge Raad*), which is based in The Hague. The five Courts of Appeal (*Gerechtshof*) are spread over the country (Amsterdam, The Hague, Leeuwarden, Arnhem,'s-Hertogenbosch). There are 19 District Courts (*Rechtbank*), which have a smaller jurisdiction than the Court of Appeal. Each District Court has several subsidiary court locations where specific cases are decided by the District Court's Cantonal Judges (*Kantonrechter*).

[1] See further *P.A. Stein,* Civil procedure, in: Introduction to Dutch Law for Foreign Lawyers, Deventer -Boston: Kluwer 1993, p. 193.

The *Wet op de Rechterlijke Organisatie* (Law on judicial organization, hereinafter: RO) regulates the subject matter competence (*absolute competentie*) of the different courts. The District Courts are the courts of first instance. All actions must be brought before a District Court. However, Cantonal Judge may have jurisdiction on the basis of an explicit statutory provision (art. 93 CCP). In general, the Cantonal Judge has jurisdiction in claims not exceeding the amount of—as per 1 July 2011—EUR 25,000. (art. 93 para (a) and (b) CCP). Furthermore, the Cantonal Judge decides in first instance in disputes arising out of employment contracts, mandatory provisions of collective labor agreements, hire-purchase of movable assets, regardless of the amount involved (art. 93 para (c) CCP) and other matters which are subjected to its jurisdiction on the basis of an explicit statutory provision (art. 93 para (d) CCP), of which landlord-tenant relations and farm tenancies are the most important examples.

Appeals from decisions in first instance of the District Court, including Cantonal Judge's decisions, where the amount involved exceeds EUR 1,750 (art. 332 CCP) are taken to the Court of Appeal which jurisdiction in civil matters is practically limited thereto (art. 60 RO). The Supreme Court is empowered to hear appeal in cassation proceedings (*beroep in cassatie*), for seeking restricted review of non-appellate judgments of the Cantonal Judge (art. 80 RO), and review of judgments in appeal of the District Courts and judgments of the Court of Appeal (art. 78 RO). The most important ground for review by the Supreme Court is violation of law, foreign law excepted (art. 79 RO).

Legal proceedings in the Netherlands are initiated either by writ of summons (*dagvaarding*) or by petition (*verzoekschrift*). In that respect a distinction is usually made between contentious and voluntary jurisdiction of the courts. There is no clear criterion by which both types of jurisdiction can be distinguished. As a rough-and-ready rule one could say that contentious jurisdiction covers the matters in which the court has to resolve a dispute between parties, while voluntary jurisdiction sees to matters in which the court is requested to grant a general provision or an appropriate measure.

Section 1.2.3 CCP (art. 99 *et seq.* CCP) regulates the territorial competence—adjudicatory authority—of the Dutch courts in contentious proceedings. The most important rules are laid down in article 99, para 1-2 CCP. If the defendant is domiciled in the

Netherlands, he is summoned before the court within whose jurisdiction his domicile is located (art. 99 para 1 CCP). If the defendant does not have a known domicile in the Netherlands but only has a residence in the Netherlands, he is summoned before the court within whose jurisdiction his residence is located (art. 99 para 2 CCP). In case *a* Dutch court has jurisdiction (*rechtsmacht*) but the defendant has neither domicile nor residence in the Netherlands, the defendant is summoned before the court in The Hague (art. 109 CCP).

In general, attachment does not establish jurisdiction of the Dutch courts. However, if the asset sought to be attached is located in the Netherlands and the owner thereof (i.e., the debtor) is not domiciled in the Netherlands, the plaintiff may levy a *conservatoir beslag*[2] on the asset in question pursuant to article 765 CCP. This type of attachment is called *saisie foraine* (attachment of the assets of foreigners). Subsequently, the plaintiff may initiate legal proceedings before the court where the attachment took place (the *forum arresti*), unless either (i) according to article 767 CCP there is another way for the plaintiff to obtain a title to enforcement (a so-called *executoriale titel*)[3] in the Netherlands, or (ii) the parties have entered into an exclusive choice of forum clause in favor of a foreign court.[4]

As to the voluntary proceedings article 262, para 1 CCP attributes—subject to the exceptions stated in section 1.3.2 CCP—territorial competence to the Dutch court in whose jurisdiction the applicant (the petitioner) is domiciled or, in the absence of domicile in the Netherlands, the court in whose jurisdiction the applicant has its residence. If *a* Dutch court has jurisdiction (*rechtsmacht*) but the applicant is domiciled abroad, the competent court is the Court of The Hague (art. 269 CCP).

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[2] See under Question 1 below.

[3] That is an instrument containing permission to levy execution (hereinafter: title to enforcement).

[4] Supreme Court 17 December 1993, *NJ* 1994, 348 (*Esmil/Enka Arabia*); Supreme Court 17 December 1993, *NJ* 1994, 350 (*Esmil/PGSP*) and Supreme Court 16 June 1995, *NJ* 1996, 256 (*SCl/AEC*). See further *A.I.M. van Mierlo* and *B.R.D Hoebeke,* Enforcement of Money Judgments (ed. Lawrence W. Newman), The Netherlands, New York: Juris Publishing, loose leave, I sub A.

1. What is the general nature and effect of judicial measures available for plaintiffs to obtain provisional relief affecting property of debtors to obtain security for judgments to be obtained ("attachments")? Freezing property in place? Placing it in the custody of a third party, such as a court official, sheriff or marshall?

Under Netherlands civil procedural law, a distinction must be made between a *conservatoir beslag* (art. 700 *et seq.* CCP), i.e., protective measures by attachment which anticipate a later judgment (hereinafter: the pre-judgment attachment[5]) and *executoriaal beslag* (art. 430 *et seq.* CCP), i.e., enforcement measures by attachment to be taken after the judgment has been obtained (hereinafter: attachment in execution).

Pre-judgment Attachment

The main purpose of a pre-judgment attachment is to prevent the debtor from alienating the attached property prior to or during legal proceedings against him. For instance, the debtor can transfer one or more of his assets to a third party, which transfer leaves the plaintiff empty handed after he obtains a judgment in his favor against the debtor. Therefore, it is in plaintiff's interest to take protective measures and attach one or more of the assets of his debtor.

A pre-judgment attachment immobilizes or freezes the attached asset(s). This means that the debtor will be deprived of his right to dispose or to encumber the asset(s) in question. In general, a disposal or an encumbrance despite the attachment cannot be opposed to the plaintiff.[6] Furthermore, neglecting the pre-judgment attachment by the debtor is both a criminal offence (art. 198 Dutch Criminal Code) and an unlawful or tortuous act (art. 162 Dutch Civil Code Book 6).

In order to achieve the above mentioned "freezing effect" the attached asset does not necessarily need to be placed in the custody of a third party (*gerechtelijke bewaring)*. It should be noted that in case of a pre-judgment attachment such a custody can only be ordered in respect of movable assets. The custody is ordered by the President of the District Court, upon the request of the plaintiff (art. 709 CCP). The

[5] In general, this term includes the pre judgment garnishment as well.
[6] Supreme Court 5 September 2008, *NJ* 2009, 154 (*Forward/Huber*).

custody will prevent the debtor from removing the asset(s) in question from the jurisdiction.

Attachment in Execution

The entitlement to effect an attachment in execution must be derived from an official title to enforcement (art. 430 CCP). Usually this title will be a final judicial decision rendered in the Netherlands[7] but it may also be a (notarial) deed which has been executed in the Netherlands[8] or any other document qualifying as a title to enforcement under Dutch law. Examples of such documents are arbitral awards rendered in the Netherlands, the official report of a dispute settlement and the injunction by the Inland Revenue.

After obtaining the title to enforcement the plaintiff can enforce his money claim vis è vis the debtor by means of an attachment in execution of one or more of the debtor's assets. In principle, the plaintiff (*i.e.* the creditor) is free in the choice which attachable assets of the debtor to attach. Prior to the attachment, a bailiff (engaged by the creditor) summons the debtor by warrant to comply with the obligations under the title to enforcement within the following two days (art. 439 CCP). If the debtor does not respond, the attachment is made by the bailiff. The latter is not necessary if a pre-judgment attachment was already made. Such attachment is converted into an attachment in execution (mainly) upon obtaining the final judgment (art. 704 CCP).[9]

The attachment implies that the attached asset(s) will finally be converted into cash on behalf of the plaintiff by means of either a public sale of the asset(s) in question or collection in case of a garnishment on (transferable) money held by the garnishee.

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[7] See in respect of the question whether a foreign money judgment provides under Netherlands law a title to enforcement *A.I.M. van Mierlo* and *B.R.D. Hoebeke,* Enforcement of Money Judgments, (ed. Lawrence W. Newman), The Netherlands, New York: Juris Publishing, loose leave, I sub A and B.

[8] See in respect of the question whether a foreign money judgment provides under Netherlands law a title to enforcement *A.I.M. van Mierlo* and *B.R.D. Hoebeke,* Enforcement of Money Judgments, (ed. Lawrence W. Newman), The Netherlands, New York: Juris Publishing, loose leave, I sub A and B.

[9] See further the remarks below under Question 2.

The debtor can avoid such conversion by paying his debt to the plaintiff promptly, i.e., prior to the public sale or the collection from the garnishee.

An attachment in execution is an individual attachment in the interest of one specific creditor. It must be distinguished from a general attachment in the interest of all creditors, which is known in Dutch law as bankruptcy (*faillissement*). Bankruptcy is not regulated by the CCP but by a special Act, the Bankruptcy Act (*Faillissementswet*). Every debtor[10] may be adjudicated bankrupt by the District Court upon the request of one or more of his creditors, regardless of whether the creditor has obtained a title to enforcement or not. The creditor must show that the debtor has reached the position of insolvency, i.e., (i) that the creditor has a claim which is just and payable but has not been paid, and (ii) that there are one or more further claims by other creditors. The effect of adjudication of bankruptcy is that the debtor can no longer dispose over his estate. It will be vested in the trustee in bankruptcy (*curator*) under supervision of a delegated judge (*rechter-commissaris*), both appointed by the court.[11]

2. What is the form of the attachment? Injunction? Other kind of judicial order? Specify.[12]

Pre-judgment Attachment

In general, a pre-judgment attachment is made at the request of the plaintiff by a writ of attachment (*exploot*), in which—amongst others—the asset sought to be attached is defined (nature, location, distinctive marks, etc).

The writ is served by a bailiff (*deurwaarder*) to the debtor or, in case of claims the debtor has against third parties or movable assets which a third party holds for the debtor, the third party (hereinafter: the garnishee). In the latter case the writ of attachment must be served to

[10] Dutch law does not distinguish between merchants and non-merchants, as is often the case abroad.

[11] See further *F.J. W. Liiwensteyn,* Bankruptcy, in: Introduction to Dutch Law for Foreign Lawyers, Deventer – Boston: Kluwer 1993, p. 182.

[12] It should be noted that the term "injunction" is not known as a separate institute under Netherlands law.

the debtor as well within eight days after the writ has been served to the garnishee (art. 720 CCP jo. 475i CCP).

The attachment is effected *eo ipso* by means of the service of the writ, unless the attachment sees to property subject to registration (*registergoederen*), such as real estate, registered aircraft and vessels. In that case the attachment is effected after the writ of attachment, served to the debtor, is entered in the Public Registers.

Protective measures can only be taken after the plaintiff has obtained a leave (*verlof*) of the President of the (competent) District Court (art. 700 CCP).[13] Such leave (together with the aforementioned writ) shall be served to the debtor or to the garnishee.

Attachment in Execution

An attachment in execution is made by a bailiff on the basis of the title of enforcement. The title of enforcement must be served to the debtor (art. 430, para 3 CCP). In case of a contemplated attachment on movable assets in the possession of the debtor or registered goods the bailiff must also request the debtor to comply with the judgment within a certain period-of time.[14] The CCP does not contain such an obligation in case of a contemplated garnishment.[15]

If the debtor is in default after the relevant period of time has lapsed, the bailiff may attach more of the assets of the debtor in order to execute the judgment. Such attachment in execution is made—without preceding leave to levy an attachment (!)—in the same manner as a pre-judgment attachment, i.e., by a writ of attachment in which the asset sought to be attached is defined. The writ is served by a bailiff to the debtor and—as the case may be—to the garnishee.

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[13] See below under Question 3.

[14] Two days in case of a contemplated attachment on movable assets (art. 439 CCP) or immovable assets (art. 502 CCP) respectively 24 hours in case of a contemplated attachment on vessels (art. 563 CCP) or aircraft (art. 584b CCP). Please note that these terms may be reduced by the President of the District Court upon request by the plaintiff or the bailiff.

[15] In that case the service of the title to enforcement tot the debtor will suffice. The garnishment can be made immediately afterwards.

3. What is the jurisdictional basis for an attachment? Is the presence of the debtor's property a sufficient basis for an attachment to be obtained, assuming other requirements are satisfied? To what extent may attachments be used as a basis for obtaining personal jurisdiction over a debtor? To what extent are attachments or similar orders intended to have extraterritorial effect?

As already mentioned above, a pre-judgment attachment is only possible after the plaintiff has obtained a prior leave to levy an attachment from the President of the District Court (*voorzieningenrechter*). Thereto the plaintiff has to present a written petition (*verzoekschrift*) to either the District Court in which jurisdiction the movable or immovable assets of the debtor are located or in case of a garnishment the District Court in which jurisdiction the debtor or the garnishee is domiciled (art. 700, para 1 CCP).[16]

The petition contains—amongst others—a description of (i) the nature of the attachment, i.e., the kind of attachment relating to the asset sought to be attached, (ii) the legal basis of the principal claim, and (iii) if possible, the extent of such claim. See also remarks below under Questions 7, 8 and 11.

Before granting the leave, the President of the District Court must summarily inquire the petition and ascertain whether the petitioner's claim seems well-founded.[17] In general, the debtor is not heard.[18] The decision to either allow or deny the attachment may be very often based solely on the information submitted by the requesting party (*ex parte*). However, the President of the District Court is not allowed to reject the petition without hearing the plaintiff.[19] The plaintiff can file for appeal within three months after the date of the decision (art. 358

[16] This rule may diverge from the general rules according to article 262 CCP as set out above in the brief introduction to civil procedure in the Netherlands.

[17] See article 700, para 2 CCP.

[18] See in that respect also the remarks below under Question 6. According to the Supreme Court this is not contrary to the principle of hearing both parties *(audi et alteram partem).* In Supreme Court 29 March 1985, *NJ* 1986*,* 242 (*Enka/Dupont*) it was decided that not hearing the debtor is justified by the plaintiffs right of effective access to the court.

[19] This is a consequence of article 279 para 1 CCP, on the basis of which a court is obliged to summon the interested parties to appear before the court 'in so far as necessary'.

CCP). Afterwards, he can eventually file for appeal in cassation (*beroep in cassatie*) within three months after the date of the decision in appeal (art. 426 CCP).

After the attachment is granted by the President of the District Court (or in appeal by the Court of Appeal), the debtor has no possibility to file for appeal (art. 700, para 2 CCP).[20]

Both the leave to levy the attachment and the pre-judgment attachment based thereon have only territorial effect in the Netherlands, although in case of a third party garnishment some scholars have an opposite opinion.

4. May an attachment be obtained in support of a proceeding on the merits in another country? If so, may the other proceeding be in court, arbitration or in another type of forum? Are attachments used as a mechanism in enforcing judgments or arbitral awards?

Pre-judgment Attachment

According to Netherlands law a pre-judgment attachment on assets located in the Netherlands is also possible if the principal claim is brought or has to be brought before a court, an arbitral tribunal or another type of forum abroad. In any case the plaintiff needs leave pursuant to article 700, para 1 CCP.

Attachment in Execution

Article 431, para 1 CCP disallows, in general, enforcement of foreign money judgments in the Netherlands. This general rule will not be applied if articles 985-994 CCP are applicable.[21] According to article 985 CCP a Netherlands court may authorize the execution of a

[20] This prohibition is mainly based on the fact that article 705 CCP entitles the debtor to sue in summary proceedings (*kort geding*) for withdrawal (*opheffing*) of the pre judgment attachment (see the remarks below under Question 20). Furthermore, the debtor cannot file for appeal in respect of a presidential leave granted after full arguments on both sides (Supreme Court 25 September 2009, *NJ* 2009, 460 (*Hagemeyer/Bekkers*)).

[21] See further *Th. M de Boer* and *R. Koting,* Recognition and enforcement of foreign judgments, in: Introduction to Dutch Law for Foreign Lawyers, Deventer – Boston: Kluwer 1993, p. 235.

foreign judgment (i.e., grant a so-called exequatur) if this can be based on a treaty or a domestic rule of law expressly providing for recognition and/or enforcement.[22]

However, an exequatur is not always granted pursuant to article 985 *et seq.* CCP. Some international regulations/treaties have their own exequatur-proceedings. This forms another exception to the general rule of article 431, para 1 CCP. In this respect two international regulations/treaties that apply to the Netherlands should be mentioned. Firstly, the European Council Regulation (EC) no. 44/2001 of December 22, 2000 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter: EEX-Regulation)[23] and secondly, the Convention on Jurisdiction and Enforcement of Decisions in Civil and Commercial Matters, signed in Lugano on October 30, 2007 (hereinafter: Lugano II Convention).[24] In this contribution we will only refer to the EEX-Regulation. If the EEX-Regulation applies, the foreign judgment will in general be recognized by the Netherlands judiciary as a matter of course (art. 38 EEX-Regulation). An exequatur will be granted by the President of the District Court in whose jurisdiction the defendant is domiciled or, in case the defendant has no domicile in the Netherlands, in whose jurisdiction the enforcement will take place (art. 38 and 39 EEX-Regulation). It should be noted that the enforcement of the foreign judgment is subject to the same terms as a Netherlands enforceable judgment.

A foreign (money) judgment cannot be enforced in the Netherlands in case neither articles 985-994 CCP nor the EEX-Regulation (or the Lugano II Convention) are applicable.[25] In that case, article 431, para 2

[22] A foreign judgment also implies a judgment by the European General Court and the European Court of Justice.

[23] Also referred to as the Brussel I-Regulation, which entered into force on March 1, 2002 and replaced the "Brussels Convention" (see *EU Official Journal* 2001, L12/1, at http://eur-lex.europa.eu/nl/index.htm).

[24] Which treaty contains similar provisions to those of the EEX-Regulation and which treaty entered into force on 1 January, 2010. (see *EU Official Journal* 2007, L 339/3, at http://eur-lex.europa.eu/nl/index.htm). Please note that Iceland has not yet ratified the Lugano II Convention (and therefore, the 'old' Convention on Jurisdiction and Enforcement of Decisions in Civil and Commercial Matters dated 16 September 1988 (Lugano I Convention) still applies in respect of Iceland).

[25] See for an overview of the relevant European regulations/treaties in this respect *A.I.M. van Mierlo* and *B.R.D. Hoebeke,* Enforcement of Money Judgments, (ed. Lawrence W. Newman), The Netherlands, New York: Juris Publishing, loose leave, I sub A.

CCP prescribes a whole new adjudication by a Dutch court. Since the landmark case Bontmantel,[26] the Supreme Court has developed a jurisprudence which enables the Netherlands court to enforce the judgment without full retria1.[27] This jurisprudence has been extended in Esmil v. Enka Arabia and Esmil v. Persian Gulf Shipyard Project.[28] In these cases the Supreme Court held that an exclusive choice of forum clause in favor of a foreign court is valid and binding, despite the question whether there is an applicable enforcement and recognition treaty between the foreign country and the Netherlands. However, if one of the parties seeks enforcement of the foreign judgment in the Netherlands when there is no applicable treaty, the principle thought is that the existence of a valid and binding exclusive choice of forum and the foreign judgment based thereupon is binding. In this respect the Netherlands court should consider the parties bound by the judgment.[29]

Nowadays, Netherlands courts will recognize in general foreign judgments in case no treaties are applicable if certain criteria's have been met. The foreign judgment has to be rendered by a convenient forum and the procedural rights of the defendant have to be safeguarded in the procedure. The Netherlands courts have to comply with the general principles comprised in treaties. This development means in general that the foreign judgments have a binding effect even if there is no treaty.

It should be noted that the possibility for the Netherlands courts remains to fully re-examine the merits of the case. This is in particular the case if the law under the foreign court is the *lex causae* (the law governing the case). Furthermore, the Netherlands court will re-examine the merits of the case if the independence of the foreign judiciary is in doubt or the existence of the judiciary tradition is very short and has not standards of quality a court judgment should meet.[30]

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[26] Supreme Court 14 November 1924, *NJ* 1925, p. 91 (*Furcoat*).

[27] See in this respect also Supreme Court 24 June 1932, *NJ* 1932, p. 1262 (*Hungarian Mortgage*) and Supreme Court 1 April 1938, *NJ* 1938, 989 (*Swiss Child II*).

[28] Supreme Court 17 December 1993, *NJ* 1994, 348 and 350.

[29] See also Supreme Court, 16 June 1995, *NJ 1996,* 256 (*SCl/AEC*).

[30] See further *A.I.M. van Mierlo* and *B.R.D. Hoebeke,* Enforcement of Money Judgments, (ed. Lawrence W. Newman), The Netherlands, New York: Juris Publishing, loose leave, I sub A and B.

5. What are the requirements for obtaining an attachment. Of property in your country? In support of a proceeding in another country, if different?

In case the President of the District Court has granted the leave to levy attachment and the pre-judgment attachment has been made by the bailiff,[31] the petitioner (i.e., the plaintiff) must bring the claim in the principal action (*eis in de hoofdzaak*)[32] before the competent court within a certain period of time indicated by the President of the District Court in the leave (art. 700, para 3 CCP). The competent court may also be a court in another country.

The pre-judgment attachment ceases automatically in case the plaintiff does not initiate the principal claim proceedings in due time, i.e., within the period of time indicated by the President of the District Court who granted the leave to levy attachment. Furthermore, the attachment is cancelled if the principal claim is dismissed and the judgment or the arbitral award in question acquired the force of *res judicata* (art. 704, para 2 CCP).

The pre-judgment attachment converts automatically into an attachment in execution if in the principal claim judgment or arbitral award is rendered in favor of the plaintiff, this title to enforcement is amenable for enforcement and such title is served upon the debtor (and, if applicable, the garnishee(s)) (art. 704, para 1 CCP).

6. May an attachment be obtained without notice to the debtor? If so, what are the requirements for notifying the debtor and what procedure is available to the debtor to challenge the *ex parte* attachment obtained? If not, what are the procedural requirements for obtaining an attachment on notice to the defendant?

Pre-judgment Attachment

In general, the President of the competent District Court grants the leave to levy attachment without hearing the debtor (*ex parte*). There are two exceptions to this rule.

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[31] See in that respect remarks above under Questions 2 and 3.

[32] This is the principal claim; the claim to which the pre judgment attachment is subject.

First, in some District Courts the debtor has the possibility to request the District Court only to give a decision on a petition for a leave to levy an attachment after the opinion of the attorney (of record) (*procesadvocaat*) of the debtor has been taken.[33] Such a request must be done in writing by the attorney of the debtor. Upon receipt of the request, the registry enters the name of the debtor on a list for a certain period of time.[34] As soon as a petition is filed by a creditor, the registry checks whether the debtor's name is on the list. If so, the attorney may be given the opportunity, for example, to argue the claim of the plaintiff or to establish *prima facie* that the plaintiff has no interest obtaining an attachment. However, "blackening" an attachment is not a guaranty. The President of the District Court can still grant the leave to levy attachment without hearing the debtor's attorney.

The second exception can be found in article 720 in conjunction with article 475c CCP. These provisions see to a contemplated attachment on wages of employees, salaries of civil servants or other periodical allowances. In those cases the President of the District Court is bound by law to (contact the debtor to) hear the debtor. The reason is that such attachment can effect the debtor's life dramatically and therefore special guarantees should be taken into account.

The pre-judgment attachment itself is always done with notice—directly or, in case of a third party garnishment, indirectly—to the debtor. See in that respect the remarks above under Question 2.

Attachment in Execution

Before an attachment in execution is possible, the title to enforcement must be served to the debtor by the bailiff (art. 430, para 3 CCP). See in that respect the remarks above under Question 2.

7. What are the elements that must be established to the satisfaction of the court for it to grant an attachment E.g., likelihood of success on the merits, likelihood that the debtor is removing, or will remove, its assets from the jurisdiction, fraudulent activity by the debtor, need for the attachment as security, for an expected judgment or award?

[33] In the Netherlands this is called *zwart maken* (literal: blacken) the pre-judgment attachment.

[34] In practice: three months.

Pre-judgment Attachment

The most important—and more general—elements of the petition have already been discussed under Question 3.

In addition thereto there are a few other requirements to be mentioned. In case of a contemplated attachment on, e.g., movable assets, bearer securities, registered shares and immovable assets the plaintiff has to show a well-founded fear of embezzlement (gegronde vrees voor verduistering) i.e., that there is a serious threat that the debtor will remove or dissipate his assets from the jurisdiction.[35] The President of the competent District Court will only examine this matter very briefly.

In case the plaintiff wants to obtain an attachment subject to a payment, the President of the District Court will fix the amount for the attachment, which amount includes the costs to which the debtor can be convicted (art. 700, para 2 CCP). A rule of thumb is that this amount is fixed at the amount involved, increased by 20-30%.

Furthermore, the President of the District Court will require that within a certain period of time the principal claim proceedings will be initiated (art. 700, para 3 CCP).[36]

Attachment in Execution

The justification of the attachment in execution is found in the title to enforcement. See the remarks above under Question 1. Generally speaking, the title to enforcement is the outcome of a lawsuit before a competent court. Legal proceedings are generally initiated either by writ of summons or by petition. The plaintiff does not need special permission from the court or any other authority in order to initiate legal proceedings.

8. What is the procedure for obtaining an attachment? What is the nature and extent of the evidence that must be presented to the court and how must it be presented?

[35] See articles 711, para 1 CCP, 711, para 3 CCP, 714 CCP and 725 CCP.
[36] See in that respect the remarks made above under Question 5.

Pre-judgment Attachment

The plaintiff has to present a petition to the (competent) District Court in order to obtain a leave to levy attachment. See the remarks above under Question 2.

The requirements for the contents of a petition in general are regulated in article 261 *et seq.* CCP. The petition must include the name, the family name, the domicile or as the case may be, the residence of the petitioner and a clear description of the reasons for the petition. With regard to a petition with regard to obtaining a leave to levy an attachment, article 700 para 2 CCP contains additional requirements. The petition must also describe (the nature of) the requested attachment, (the nature of) the right(s) on the basis of which the plaintiff seeks to obtain the leave and, if this rights pertains to a money claim, the maximum amount of the money claimed.

The petition must be presented to the registry of the competent District Court by the attorney (of record) of the petitioner.

The territorial competence of the court pursuant to article 262 CCP is already set out above in the brief introduction and under Question 3.

Attachment in Execution

As mentioned earlier the attachment in execution is subject to a title to enforcement. See the remarks above under Questions 1 and 2.

9. To what extent, and under what circumstances, is an undertaking, in the form of a third party bond or guarantee or a deposit, required in order to obtain an attachment? In what amount, in relation to the amount claimed, is the undertaking required? How are such undertakings generally obtained, as a matter of practice? How much do they cost?

Pre-judgment Attachment

In general, the CCP does not require an undertaking from the plaintiff in order to obtain a leave to levy an attachment. However, the President of the District Court may require security from the plaintiff in order to obtain the leave (art. 701, para 1 CCP).

The security will be in terms of an amount of money related to the possible damage to be suffered by the debtor as a consequence of the attachment. This can be done by e.g. a bank guarantee or a deposit on a secured bank account on behalf of the debtor. In case of attachment on vessels (art. 728 *et seq.* CCP) the so-called *Rotterdams garantieformulier* (guarantee form) is often used. A copy of this guarantee in Dutch and an official translation in English is attached hereto as Appendix I and II respectively.

Article 701, para 1 CCP is a provision written in favor of the debtor. Although the debtor is generally not heard by the President of the District Court,[37] the latter takes his interests into account. Prior to or simultaneously with the service of the writ of attachment, the plaintiff has to offer to the debtor the security determined by the President of the District Court in the leave to levy attachment (see art. 701, para 2 CCP). In case the plaintiff does not offer adequate security, the attachment cannot be made. On the other hand, refusal by the debtor of an adequate security does not obstruct the plaintiff's power to attach one or more of the assets of the debtor.

Attachment in Execution

In general, except for judgments from the Cantonal Judge in cases involving an amount less than of EUR 25,000,-. (art. 93 para (a) and (b) CCP) all decisions, rendered in both voluntary and contentious proceedings, are open to appeal. In case the debtor lodges an appeal of a money judgment which is in favor of his creditor, the creditor is not able to execute the judgment in question. Appeal has a suspensive effect, unless the judgment is declared provisionally enforceable (*uitvoerbaar bij voorraad*) upon request of the plaintiff (art. 233 and 288 CCP in respect of proceedings initiated by a writ and proceedings initiated by a petition, respectively). If such a request is made the judge may stipulate that the money judgment is only provisionally enforceable in case the plaintiff provides security to a certain amount (art. 233, para 3 and 288 CCP). The amount is determined by the judge, based upon the balancing of interests in this respect.[38] The CCP

[37] See the remarks above under Questions 3 and 6.

[38] Supreme Court 2 May 2003, *NJ* 2004, 291 (*De Jong/Lasschuit*). A general recovery risk in relation to the plaintiff is not a sufficient ground, nor is the debtor's argument that (major) damage to the debtor is impending due to the attachment (Supreme Court 17 June 1994, *NJ* 1994, 591 (*Korver/Stichting Ziekenhuis De Heel*)

does not contain specific provisions in this respect. The amount of the security may be lower than the amount the debtor has to pay to the creditor according to the judgment in question.[39]

10. What does the undertaking secure? Damages to the debtor if the attachment is ultimately vacated? Do such damages include interest? Other elements? Legal fees? To what extent? Court costs? To what extent?

Pre-judgment Attachment

Article 701, para 1 CCP contains only one criterion for the secured undertaking: *schade die door het beslag kan worden veroorzaakt,* which means—roughly translated—"the damage which might be caused by the attachment."

The damage suffered by the debtor if the attachment is vacated, might include interest, legal fees and court costs. However, in practice the debtor is granted only part of the legal fees due to his attorney (*(proces)advocaat*), although article 237 *et seq*. CCP orders the losing party to reimburse his opponent's expenses.

It should be noted that the undertaking has no direct relation to the amount the debtor has to pay to the creditor according to the judgment.

Attachment in Execution

The CCP does not contain specific provisions in this respect. Scholars are of the opinion that the security pursuant to article 233, para 3 CCP may see not only to the amount the debtor has to pay to the creditor according to the judgment, but also to damage suffered by the debtor.[40]

11. How specific must the application for an attachment be as to the nature, extent and location of the assets sought to be attached? How many potential garnishees may be served with an order of attachment?

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and Supreme Court 5 January 1996, *NJ* 1996, 334, respectively).

[39] Supreme Court 18 November 1983, *NJ* 1984, 272.

[40] See amongst others *W.H.D. Asser,* Burgerlijke Rechtsvordering, loose-leaf, articles 52-55, note 5.

The contents of the petition in which the President of the District Court is requested to grant its leave for attachment has already been discussed above under Questions 3, 7 and 8.

Specification of the assets sought to be attached (pre-judgment or in execution)—especially nature and location—must be done by the bailiff in the writ of attachment. See also the remarks above under Question 2.

12. What are the obligations of a third party who is served with an order of attachment to report on the nature and extent of the assets of the debtor in his possession and the extent to which other persons, including the party served itself, have prior or competing liens on the property covered by the attachment order?

Pre-judgment Garnishment

From the moment the garnishment is effected (i.e., the service of the writ of attachment to the garnishee) the garnishee must refrain from paying any money to the debtor.[41] Such payment would not discharge the garnishee from his duty with regard to the plaintiff/garnishor.

The garnishee is held to give a written statement (*verklaring*) as soon as four weeks have lapsed since the service of the writ of attachment.[42] In the statement the garnishee has to declare amongst others—(i) the sum or the movable assets he is due to the debtor, (ii) which security-rights exist on the attached claims or assets (if any and known to the garnishee), and (iii) the name of the person entitled thereto.

Garnishment in Execution

The obligations of the garnishee in case of a garnishment in execution do not differ very much from those in case of a pre-judgment garnishment.

The garnishee must refrain from paying any money to the debtor. He must give a statement as well. Together with the statement he is

[41] See article 720 jo. article 475, para 1 sub *c* CCP and article 475h, para 1 CCP.
[42] See article 720 jo. 476a, para 1 CCP.

obliged—and that is new in comparison with the pre-judgment attachment—to hand over to the bailiff the sum or the movable assets mentioned in the statement[43] Furthermore, if the garnishee refuses to give a statement he will be summoned by the garnishor before the District Court in a statement procedure (*verklaringsprocedure*).[44] The District Court then orders the garnishee to pay that sum over to the plaintiff/garnishor to the amount of the plaintiffs claim towards the debtor under the title to enforcement.

13. To whom are such reports given and what is the form of such reports? To the court? To the attaching plaintiff? What is the form of such reports? In writing? Oral? Informal? Hints?

The garnishee must present his written statement either to the bailiff who has served the writ of attachment or to the plaintiffs counsel, but only if the latter is mentioned in the writ of attachment.[45]

The bailiff or the counsel are obliged to send a copy of the written statement to the debtor within three days after the date of receipt.[46]

14. What kind of property of a debtor may be attached? Debts of third parties to the debtor? Claims of the debtor against third parties? Expectancies?

In general, only actual property of the debtor—on the date the attachment is made—can be subject to attachment.[47] However, future claims of the debtor against third parties can also be subject to attachment (garnishment), but only if these claims are directly originating from a legal relationship (*rechtsverhouding*) that already exists at the service of the writ of attachment.[48]

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[43] See article 477 CCP. This obligation exists in case of a provisional attachment only after (i) the plaintiff has obtained a enforceable tide to enforcement in the principal claim proceedings, (ii) this title has been served to the garnishee within one months, and (iii) at least four weeks have lapsed since this service. See article 723 CCP.

[44] See article 477a CCP.

[45] See article 476b, para 1 CCP.

[46] See article 476b, para 3 CCP.

[47] See for some exceptions the remarks below under Question 16.

[48] See (art. 720 *jo.)* article 475, para 1 CCP and Supreme Court 25 February 1932, *NJ* 1932, 301.

15. What is the effect of the service of an order of attachment on assets of the debtor that came into possession of the garnishee after the time of the service of the attachment order. Are there any time limits on the effectiveness of the order of attachment? In particular, what is the effect of the service of the order of attachment on a bank that has issued or confirmed a letter of credit of which the debtor is a beneficiary?

Only future claims—and not future movable assets—are eligible for attachment. Therefore, movable assets of the debtor that come in the possession of the garnishee after the time of the service of the writ of attachment are not attached.

If the writ of attachment is subject to the bank account of the debtor, the garnishment only includes the credit balance at the service of the writ and not what is transferred by third parties to the account at a later date.[49]

In case the writ of attachment is served on a bank that has issued or confirmed a letter of credit of which the debtor is the beneficiary, the matter of practice is of great importance. In the Netherlands letters of credit will only be issued under the resolutive condition of attachment. This means that the attachment will have no effect whatsoever.

16. Are there certain kinds of assets or property of a debtor that are immune, or in some other way protected from attachment, e.g., pension funds, salaries, wages, diplomatic property, other sovereign property, other property specified under consumer-protection laws?

Some assets are immune from attachment under Netherlands law.

If the debtor is a public entity, the attachment cannot relate to assets allocated to the public service.[50] The reason is that the public life should not be effected by an attachment. The public must have the opportunity to use, for instance public transport at any time.

Furthermore, wages of employees, salaries and pensions of civil servants are up to a certain limit as described by law exempt from

[49] Supreme Court 7 June 1929, *NJ* 1929, 1285.
[50] See articles 436 and 703 CCP.

garnishment.[51] The plaintiff has to leave a minimum amount to the debtor so the latter can provide himself in needs of vital importance.

Finally, an attachment cannot effect certain assets of debtor such as his bed, the bed-linen, the clothes to wear for him and his family, the tools he needs for crafts in his personal business and the fare in stock in his home for one month.[52]

17. For how long may an order of attachment remain in effect? If the attachment order is in support of a proceeding in another forum, are there any requirements concerning when, in relation to the date of the issuance of the order of attachment, the proceeding in the other forum must be commenced? Completed?

Pre-judgment Attachment

As was remarked above under Question 5, a pre-judgment attachment ceases automatically in case the plaintiff does not initiate the principal claim proceedings in due time, i.e., within the period of time indicated by the President of the District Court in the leave to levy attachment. In general, this period of time is within two weeks of the date of the attachment. Furthermore, the attachment is automatically cancelled if the principal claim is dismissed and the judgment or the arbitral award in question acquired the force of *res judicata* (art. 704, para 2 CCP).

Finally, the debtor is entitled to sue in summary proceedings (*kort geding*) for withdrawal (*opheffing*) of the pre-judgment attachment.[53]

Attachment in Execution

The attachment implies that the attached asset(s) will finally be converted into cash on behalf of the plaintiff by means of either a public sale of the asset(s) in question or collection in case of a garnishment on (transferable) money held by the garnishee. It goes without saying that after conversion the attachment has ended.

[51] See articles 475b-475c CCP and article 475f CCP.
[52] See articles 447 and 448 CCP.
[53] See article 705, para 1 CCP and the remarks below under Question 20.

18. What rights in the plaintiff are created by the service of an order of attachment? Priority over creditors attaching later? Do banks and other garnishees have set-off or other priority rights superior to those of creditors attaching assets of debtors who are all debtors of such garnishees?

The plaintiff has no specific rights. The attachment does not create priority over other creditors attaching later. An asset simultaneously attached by two or more creditors will be sold in public and the proceeds will be divided according to the principle of *paritas creditorum,* unless there is a cause of preference recognized by law.

19. How are attachments ultimately enforced as judgments? What is the procedure? What happens if multiple plaintiffs seek judgments against the same property at roughly the same time?

A pre-judgment attachment (ultimately) converts by virtue of law into an attachment in execution (see the remarks above under Question 5). The attachment in execution is enforced by converting the attached assets into cash on behalf of the plaintiff (see the remarks above under Question 1).

If multiple plaintiffs seek judgment against the same property at roughly the same time and in this context each attach the same asset of the debtor, the proceeds of the sale of this assets will be divided according to the principle of *paritas creditorum,* unless there is a cause of preference recognized by law (see the remarks above under Question 18).

20. What is the procedure for challenging or vacating an order of attachment?

See the remarks above under Questions 1 and 18.

21. What is the procedure for challenging or vacating an order of attachment?

Each interested party, the debtor included, has always the possibility to sue in summary proceedings (*kort geding*) for withdrawal

(*opheffing*) of a pre-judgment attachment. Article 705, para 2 CCP states a non exhaustive list of grounds for withdrawal (*opheffing*). Challenge may be possible, e.g., in case it appears after a brief examination that the attachment is unnecessary because the plaintiff has no claim or if the debtor undertakes security for the payment of the principal claim.

In general, the President of the District Court who has granted the leave for attachment is the competent judge to challenge the attachment (art. 705, para 1 CCP). However, article 705, para 1 CCP does not imply an exclusive jurisdiction for this President and does not infringe the competence of a President of another District Court pursuant to article 254 CCP.[54]

[54] Supreme Court 23 February 1996, *NJ* 1996, 434 (*DKHB/KIVO*).

APPENDIX I

ROTTERDAM GUARANTEE FORM 2008

The undersigned (**A**), waiving and renouncing all rights and defences, conferred on guarantors, and in particular the provisions of the articles 7:852 and 7:855 Dutch Civil Code, hereby irrevocably declares to bind itself as surety to and in favour of (**B**) (the Creditor) by way of security for the true and proper payment by (**C**) (the Principal Debtor) of the amount the Principal Debtor may be found to be indebted to the Creditor by virtue of a judgment (which is not or no longer subject to appeal) rendered against the Principal Debtor by a competent court of law having jurisdiction in the matter hereinafter mentioned, or by virtue of a valid arbitration award which is not or no longer subject to appeal or by virtue of an amicable settlement between the parties, in respect of the principal amount, interest and costs of suit relating to a claim at present estimated by the Creditor at (**D**) for (**E**).

The expression "a judgment (which is not or no longer subject to appeal)" is deemed to include a judgment by default rendered against the Principal Debtor, provided that such judgment has been served upon the undersigned and provided that no appeal has been entered against such judgment within six weeks after that service.

If the Principal Debtor is declared bankrupt or granted a suspension of payment, or if a statutory debt rescheduling scheme has been implemented regarding the Principal Debtor, or the Principal Debtor is in liquidation or liquidated, the Creditor is entitled to bring legal proceedings against the undersigned in order to have the indebtedness of the Principal Debtor ascertained by the Court. In that event, the undersigned undertakes to pay the Creditor the indebtedness of the Principal Debtor as established by a judgment (which is not or no longer subject to appeal) rendered in those proceedings, subject to the maximum amount set forth hereinafter.

This guarantee is hereby given without any prejudice (including any question as to statutory limitation of liability and the right to demand a release of this guarantee and/or a reduction of the amount thereof), and for a maximum amount of (**F**) for the purpose of the release from and/or the prevention of a prejudgment attachment of (**G**) on account of the above-mentioned claim(s).

This guarantee is governed by the law of the Netherlands. The undersigned and the Creditor submit to the non-exclusive jurisdiction of the competent court of law in Rotterdam for disputes and claims in respect of this guarantee.

This guarantee will expire unless before or within (**H**) months from the date of signing hereof legal proceedings have been instituted with relation to the aforesaid issue against the Principal Debtor in a competent court of law having jurisdiction in the matter, or against the undersigned, as provided in the third paragraph above, or a deed of compromise has been signed or an appointment of one or more arbitrators has been notified or requested or proposed under an arbitration clause, or an amicable settlement has been concluded between the parties.

This guarantee will also expire if the proceedings before the court or the arbitration proceedings, instituted by the Creditor within the time limit mentioned in the previous paragraph, all have led to a decision, which is not or no longer subject to appeal, that the court or arbitrator(s) lack(s) jurisdiction or that the Creditor has no right to claim or that the claim of the Creditor is dismissed or that the proceedings are struck out for want of prosecution, or if the proceedings have been finally withdrawn by the Creditor without an amicable settlement having been concluded.

APPENDIX II

ROTTERDAMS GARANTIEFORMULIER 2008

De ondergetekende **(A)** verklaart hierbij onherroepelijk, onder afstand van alle rechten en verweermiddelen en meer in het bijzonder het bepaalde in de artikelen 7:852 en 7:855 BW, zich ten behoeve van **(B)** (de gewaarborgde) te stellen tot borg voor **(C)** (de hoofdschuldenaar) zulks tot meerdere zekerheid voor de betaling door laatstgenoemde aan de gewaarborgde van het bedrag, tot betaling waarvan de hoofdschuldenaar ingevolge in kracht van gewijsde gegane beslissing van de bevoegde rechter, gewezen tegen de hoofdschuldenaar, of ingevolge rechtsgeldige arbitrale beslissing die niet of niet langer onderhevig is aan hoger beroep, of ingevolge minnelijke regeling tegenover de gewaarborgde zal blijken verplicht te zijn voor hoofdsom, rente en kosten ter zake van een vordering, thans door de gewaarborgde begroot op **(D)**, wegens **(E)**.

Onder "in kracht van gewijsde gegane beslissing" wordt mede verstaan een aan de ondergetekende betekend verstekvonnis gewezen tegen de hoofdschuldenaar, waartegen binnen zes weken na de datum van die betekening geen verzet is gedaan.

In geval van faillissement van of surséance van betaling verleend aan de hoofdschuldenaar, of in geval van toepassing van een wettelijke schuldsaneringsregeling op de hoofdschuldenaar, of ingeval de hoofdschuldenaar in vereffening is of vereffend is, is de gewaarborgde gerechtigd in een procedure tegen de ondergetekende de betalingsverplichting van de hoofdschuldenaar te laten vaststellen in welk geval de ondergetekende aan de gewaarborgde zal betalen hetgeen de hoofdschuldenaar zal blijken verplicht te zijn blijkens vaststelling bij in kracht van gewijsde gegane uitspraak in die procedure, met inachtneming van het hieronder te noemen maximum bedrag.

Deze borgtocht wordt gesteld sans préjudice (ook wat betreft enige wettelijke beperking van aansprakelijkheid en het recht om teruggave van deze garantie respectievelijk vermindering van het maximum bedrag te vorderen) en tot een maximum bedrag van **(F)**, zulks ter opheffing en/of voorkoming van conservatoir beslag ter zake voormeld op **(G)**.

Deze borgtocht wordt beheerst door Nederlands recht. De rechter te Rotterdam zal (mede) bevoegd zijn om van geschillen en vorderingen betreffende deze borgtocht kennis te nemen.

Deze borgtocht vervalt indien niet voor, of binnen (**H**) maanden na dagtekening dezes ter zake voormeld een vordering als bovenbedoeld voor de bevoegde rechter tegen de hoofdschuldenaar of, zoals hierboven in de derde alinea bepaald, tegen de ondergetekende is ingesteld, of een akte van compromis is ondertekend, of de benoeming van één of meer scheidslieden ingevolge een arbitraal geding is aangezegd, verzocht of voorgesteld, of een minnelijke regeling tot stand is gekomen.

Deze borgtocht vervalt tevens indien de door de gewaarborgde binnen de in de vorige alinea genoemde termijn ingestelde procedure of procedures voor de rechter of voor arbiters alle geleid hebben tot een onherroepelijke onbevoegdverklaring of niet-ontvankelijkverklaring of afwijzing van de vordering, of van instantie vervallen verklaard zijn bij in kracht van gewijsde gegane uitspraak, of definitief zijn ingetrokken door de gewaarborgde terwijl er geen minnelijke regeling tot stand is gekomen.